McKesson Drug Company *and* David P. Malik *and* Robert J. McCullough

Teamsters Local 443, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* David P. Malik *and* Robert J. McCullough. Cases 39-CA-138-1, 39-CA-138-2, 39-CB-54-1, and 39-CB-54-2

July 31, 1981

DECISION AND ORDER

On February 24, 1981, Administrative Law Judge Irwin Kaplan issued the attached Decision in this proceeding. Thereafter, Respondent Employer and Respondent Union filed exceptions and supporting briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent McKesson Drug Company, Rocky Hill, Connecticut, its officers, agents, successors, and assigns, and Respondent Teamsters Local 443, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, except that the attached notices are substituted for those recommended by the Administrative Law Judge.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT recognize Teamsters Local 443, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein Teamsters), as the representative of our Rocky Hill, Connecticut, employees unless and until it has been certified by the National Labor Relations Board as the exclusive bargaining representative of our employees.

WE WILL NOT give any force or effect to the November 1978 agreement made with Teamsters or to any renewal, extension, modification, or supplement thereto.

WE WILL NOT assist Teamsters in any other manner to become the representative of our Rocky Hill, Connecticut, employees.

WE WILL NOT encourage membership in, or activities on behalf of, Teamsters by discriminating against our employees with respect to their hire, tenure, and terms and conditions of employment.

WE WILL NOT threaten our employees with discharge for engaging in union activities and/or utilizing the Board's processes and WE WILL NOT promulgate an overly broad no-solicitation rule.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL withdraw and withhold all recognition from Teamsters as the representative of our Rocky Hill, Connecticut, employees for the purposes of collective bargaining unless and until the said labor organization shall have been duly certified by the Board as the exclusive representative of such employees.

WE WILL jointly and severally with Teamsters reimburse all present and former Rocky Hill, Connecticut, employees for any initiation fees, dues, or other moneys paid or withheld from them pursuant to the aforesaid collective-bargaining agreement or to any agreement superseding it but such reimbursement shall not extend to any such employees who may have

[1] Respondents contend that the complaint is barred by Sec. 10(b) of the Act. We find no merit to this contention. Sec. 10(b) is a statute of limitations and is not jurisdictional in nature. It is an affirmative defense and, if not timely raised, is waived. *Vitronic Division of Penn Corporation*, 239 NLRB 45 (1978); *Systems Council T-6, International Brotherhood of Electrical Workers, et al. (New York Telephone and Telegraph Company)*, 236 NLRB 1209, 1217 (1978), enfd. 599 F.2d 5 (1st Cir. 1979). The record establishes that Respondents first raised the defense of Sec. 10(b) in their briefs to the Administrative Law Judge and did not plead or litigate the issue at the hearing. Therefore, we agree with the Administrative Law Judge that Respondents did not raise the affirmative defense of Sec. 10(b) in a timely manner and that this defense must be considered waived.

We have modified the Administrative Law Judge's notices to conform with his recommended Order.

[2] Respondent Employer and Respondent Union have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] In affirming the Decision and adopting the recommended Order of the Administrative Law Judge, we do not rely on *Mid-West Piping and Supply Company, Inc.*, 63 NLRB 1060 (1945), which we find to be inapplicable to the facts of the instant case. Unlike *Mid-West Piping*, the instant case does not present a situation where competing unions have made rival claims for majority status and recognition.

voluntarily joined and been members of Teamsters prior to October 1, 1979.

McKESSON DRUG COMPANY

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT act as the collective-bargaining representative of McKesson Drug Company's Rocky Hill, Connecticut, employees unless and until we have been certified by the National Labor Relations Board as the exclusive bargaining representative of such employees.

WE WILL NOT give any force or effect to our contract with McKesson Drug Company executed around November 1978, insofar as it applies to the Rocky Hill facility, or to any modification, extension, renewal, or supplement thereto.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL jointly and severally with McKesson Drug Company reimburse present and former Rocky Hill, Connecticut, employees, for any initiation fees, dues, or other moneys paid or withheld from them pursuant to the aforesaid collective-bargaining agreement or any agreement susperseding it but such reimbursement shall not extend to any such employees who may have voluntarily joined and been members of our Union prior to October 1, 1979.

TEAMSTERS LOCAL 443, A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION

STATEMENT OF THE CASE

IRWIN KAPLAN, Administrative Law Judge: This case was heard in Hartford, Connecticut, on September 15 and 16, 1980. The original charges were filed against McKesson Drug Company (herein also Respondent McKesson or McKesson) on February 21, 1980 (Case 39-CA-138), and February 25, 1980 (Case 39-CA-138-2), by individuals David Malick and Robert McCullough, respectively, and amended by said Malick (Case 39-CA-138-1) and McCullough (Case 39-CA-138-2) on April 28, 1980. The original charges were filed against Teamsters Local 443, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein also Respondent Teamsters or Teamsters), by the aforenamed individuals, David Malick and Robert McCullough, on March 19, 1980, in Case 39-CB-54-1 and Case 39-CB-54-2, respectively. The aforenoted charges and amendment thereto against McKesson and the charges against the Teamsters (collectively Respondents) gave rise to an order consolidating cases, consolidated complaint, and notice of hearing issued on May 9, 1980.

The consolidated complaint in essence alleged that, commencing in or about September 1979 and continuing to date, Respondent McKesson rendered assistance and support to Respondent Teamsters by: (a) permitting the Teamsters to utilize McKesson's Rocky Hill, Connecticut, facility to hold meetings with McKesson's employees; (b) urging its employees to sign Teamsters membership cards and checkoff authorizations; and (c) withholding certain wages of its employees and transmitting same to Respondent Teamsters as union dues and initiation fees notwithstanding the absence of valid employee authorizations. Further, in or about September 1979, Respondent McKesson granted recognition to Respondent Teamsters for its nonsupervisory employees employed at its Rocky Hill, Connecticut, facility and during the same month Respondents entered into, maintained, and enforced a collective-bargaining agreement containing, *inter alia*, a union-security provision. By engaging in the aforenoted acts and conduct, it is alleged that Respondents McKesson and Teamsters violated Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2), respectively, of the National Labor Relations Act, as amended (herein called the Act). Still further, it is alleged that Respondent McKesson in October 1979 independently violated Section 8(a)(1) of the Act by: (a) threatening its employees with discharge unless they signed Teamsters membership cards; (b) threatening its employees with discharge because they circulated a petition seeking an election to determine their collective-bargaining representative; (c) interrogating its employees about their union activities and about their utilization of the National Labor Relations Board's (herein called the Board) processes; (d) creating the impression among its employees that their union activities and utilization of the Board's processes were under its surveillance; and (e) promulgating, maintaining, and enforcing by verbal announcement an overly broad no-solicitation rule.

Respondents McKesson and Teamsters filed separate answers conceding, *inter alia*, certain jurisdictional facts but each denying the commission of any unfair labor practices. Further, Respondents McKesson and Teamsters in their respective briefs raised for the first time that all matters pertaining to recognition and the contract at Rocky Hill are time barred by Section 10(b) of the Act.

Upon the entire record, including my observation of the demeanor of the witnesses and after careful consideration of the post-trial briefs, I find as follows:

FINDINGS OF FACT

I. JURISDICTION

At all times material herein Respondent McKesson has maintained an office and place of business in Rocky Hill, Connecticut, wherefrom it has been engaged in the wholesale distribution of drug and pharmaceutical products. In connection with the aforenoted business operations, and during an appropriate 12-month time frame, Respondent McKesson has sold and shipped from its Connecticut facilities products, goods, and materials valued in excess of $50,000 directly to points outside the State of Connecticut. Respondent McKesson admits, the record discloses, and I find that it is now and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS INVOLVED

Respondent Teamsters admits, and I find, that it is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

It is alleged, the record disclosed, and I find that Local 566, Retail, Wholesale and Department Store Union, AFL-CIO (herein RWDSU), is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting*

McKesson is a distributor of pharmaceuticals, cosmetics, and other sundry items, servicing in the main retail and chain drugstores and hospitals. It owns and operates some 60 distribution centers where it receives merchandise from a multitude of suppliers and in turn ships this merchandise to the various retail outlets and hospitals. In 1978 McKesson's facilities included a distribution center in Springfield, Massachusetts, a distribution center in New Haven, Connecticut, and a smaller branch in East Hartford, Connecticut,[1] the facilities involved herein. At that time McKesson's warehouse employees and drivers employed in Springfield and New Haven were represented by the RWDSU since around 1972 and Teamsters upwards of 20 years, respectively, and the East Hartford employees were unrepresented.

In 1978, Respondent McKesson decided to consolidate its Springfield, New Haven, and East Hartford operations into a single unit and began a search for a location, settling on a site in Rocky Hill, Connecticut.

By letters dated June 2, 1978, McKesson's personnel manager, Milton Lewis, Jr., wrote to Edward Brereton and John Foley of the Teamsters and RWDSU, respectively, confirming earlier telephone conversations whereby he had advised them of negotiations between the Company and the town of Rocky Hill regarding a site for a new distribution center. (G.C. Exhs. 4 and 5.) In this connection Lewis pointed out that, if the talks with the Rocky Hill Planning Commission over zoning restrictions were successful, it was anticipated that the deal would be finalized over the next few weeks. Lewis then promised to keep Brereton and Foley posted and expressed a willingness to meet and bargain "if a decision is made which would have an economic impac[t]" on their "membership[s]." (G.C. Exh. 5; see also G.C. Exh. 4.) While in Lewis' letter to Brereton he expressed a "hope" that employees "would continue their service with the Company" (G.C. Exh. 4), this sentiment was omitted from his letter to Foley. (G.C. Exh. 5.)

McKesson's manager of labor and employee relations, William Momaney,[2] testified that as a result of the Company's June 2 letter (G.C. Exh. 4) the Teamsters requested bargaining concerning the impact of the decision to consolidate the three units. Momaney testified that these negotiations culminated in a contract (G.C. Exh. 2) which McKesson and the Teamsters contend encompassed the units that were to be consolidated at Rocky Hill whenever that facility became operational.[3] In this connection Momaney by letter dated November 27, 1978, wrote to the Teamsters in relevant part as follows:

> Due to the uncertain time frame in relocating to our Rocky Hill facility, I thought it perhaps would be beneficial to all parties to signify their acceptance of those items agreed to at negotiations but not included in the labor agreement.
>
> If you would kindly acknowledge the enclosed by affixing your signature where noted, I will secure Company signatures and return complete documents to you for your files. [G.C. Exh. 6.]

According to Momaney, McKesson accorded recognition to the Teamsters in November 1978 for the planned consolidated unit at Rocky Hill because it alone had demanded recognition and Respondent Company understood on the basis of informal polls that, of the employees employed at the Springfield, New Haven, and East Hartford facilities who were willing to transfer, a majority of them were from New Haven. Thus, Momaney testified that, of the approximately 46 unit employees who expressed a willingness to transfer to Rocky Hill, approximately 30 of them were from New Haven (under

[1] Respondent McKesson characterized the East Hartford facility as a "rex unit" in distinguishing it from the much larger "full line" facilities in Springfield and New Haven. Thus, the inventory involving the "rex unit" consists of approximately 3,000 to 4,000 items which are housed in a facility of approximately 6,000 square feet whereas the "full line" inventory comprises approximately 15,000 to 17,000 items which are housed in facilities of approximately 50,000 square feet. As will be noted *infra* there were substantially fewer employees in East Hartford than in Springfield or New Haven.

[2] A portion of *Momaney's* testimony was not carried on tape. Counsel for the General Counsel by a motion to supplement the record dated November 7, 1980, has moved for the receipt in evidence as Jt. Exh. 1 *Momaney's* testimony as reconstructed by counsel for Respondent McKesson. As all parties have joined in the motion, it is hereby granted and the testimony as reconstructed is received as Jt. Exh. 1.

[3] The contract in pertinent part describes the bargaining unit as "cover[ing] all warehouse employees and drivers in the Company's Connecticut Distribution Center . . . ." (G.C. Exh. 2.) By its terms the contract is effective from November 1, 1978, until October 31, 1981. The Rocky Hill facility did not become operational until August or September 1979.

Teamsters contract).[4] Momaney testified without contradiction that the RWDSU never demanded recognition for employees at Rocky Hill. According to Momaney, he and Respondent Company's zone general manager, Jack Smith, met with Foley in September 1978 and advised him that Springfield as well as the New Haven and East Hartford facilities would close and consolidate to form the new Rocky Hill distribution center. Momaney testified that Foley asked whether the Company would offer Springfield employees employment at the Rocky Hill facility and expressed pleasure on learning that offers would be made, but he did not demand recognition for that location.[5]

According to Momaney it was originally anticipated that the Company would commence operations at the Rocky Hill facility in May 1979. As noted earlier, the Rocky Hill location did not become operational until August or September 1979.[6] Jane Downey, regional manager for McKesson's northern region which encompassed the facilities involved herein testified that "[f]rom very early in 1979 up until the time . . . before the move took place . . . the vast majority of [New Haven employees] were planning to transfer [to Rocky Hill]." In addition, Downey testified that she had information at that time that the small group of East Hartford employees were planning to move as well as approximately 50 percent of the Springfield employees although she asserted that this latter group continued to drop in number "as time went on."[7] According to Downey, when she visited these locations in mid-July, "maybe a handful of people from Springfield . . . indicat[ed] that they were definitely going to [Rocky Hill]"; whereas 60 to 70 percent of the New Haven unit employees indicated a continued interest in transferring to the new location.

In July or August, McKesson's Springfield distribution center manager, Nick Bekish, met with employees employed at that location individually in his office to discuss, *inter alia*, the terms of the transfer to Rocky Hill.[8] The employees were told by Bekish that the Springfield location would soon close and they had the option to transfer to Rocky Hill or be terminated with severance pay. Bekish pointed out to the Springfield employees that if they elected to transfer to the new location in Rocky Hill they would be covered by the Teamsters contract. Robert Quigley, a shop steward at Springfield and a RWDSU member, testified that he questioned Bekish regarding an election to determine the bargaining agent and the latter responded negatively.[9]

The record discloses that on August 6 and 7 Respondent Company hired approximately 12 new employees to work at the Rocky Hill facility. (G.C. Exh. 7.) One of those employees, David Malick, testified that in late July he was among a group of approximately 12 applicants and they all attended a meeting addressed by Bekish and Smith. According to Malick, the applicants were told at this meeting that the Rocky Hill facility was going to be a union shop but did not identify the Union.[10]

The Springfield and East Hartford facilities shut down permanently in August. On August 27 all six East Hartford employees as well as eight employees from Springfield transferred to Rocky Hill. (G.C. Exh. 7.) The New Haven employees (only six in number) did not transfer to the new consolidated location until September 10. Approximately 1 week after the New Haven employees transferred, a petition was circulated among the Rocky Hill employees calling for an election to determine their bargaining agent, but it did not identify any union by name. According to Quigley and Robert McCullough (another former Springfield employee), after an overwhelming majority of the employees signed the petition, the two of them met with Rocky Hill Distribution Manager Richard Corcoran and told him of the employees' sentiment and that they were going to file said petition with the Board.[11] Corcoran conceded meeting with Quigley and McCullough, but denied that he had any discussion with them about a petition. According to Corcoran, Quigley and McCullough requested that he check with his superiors to determine whether the employees were bound by the Teamsters contract and he in turn discussed the subject with Smith. It is undisputed that, later the same day, Corcoran advised Quigley and McCullough that the Teamsters contract covered the Rocky Hill distribution center and the Company was obligated to abide by its terms.

In October, Corcoran in the presence of other company officials introduced Teamsters Business Representatives Felix Del Guidice and Lou Amendola to Rocky Hill employees at two separate meetings on the same day which were held in the lunchroom at that distribution center. The drivers, approximately 15 in number, attended a meeting held at approximately 8 a.m. (the workday started at 7 a.m.) and lasting 1-1/2 hours. Quigley ques-

[4] *Momaney* testified that he anticipated a unit complement of about 48 employees at the Rocky Hill Distribution Center. While the record does not disclose the precise employee complement at the three locations in September 1978, *Momaney* testified that in mid-July 1978 there were approximately 35 unit employees employed in New Haven, 25 in Springfield, and 6 in East Hartford.

[5] Neither *Smith* nor *Foley* testified nor did they appear at the hearing. *Smith* was no longer employed by Respondent Company at the time of the hearing.

[6] All dates hereinafter refer to 1979 unless otherwise noted.

[7] The record discloses that the commute from East Hartford to Rocky Hill is about 20 minutes. Springfield and New Haven are each approximately 40 miles from Rocky Hill.

[8] The Springfield employees first learned about the decision to close and to consolidate at a new location in late 1978.

[9] The record discloses that *Bekish* suffered a heart attack in late August or early September and has since been a permanently disabled. *Bekish* did not testify nor did he appear at the hearing.

[10] On the basis of demeanor, responsiveness, consistency, and plausibility of testimony, I found *Malick* to be an impressive witness. It is also noted that *Malick* was still employed by Respondent Company at the time of the hearing and as such he testified against self-interest, a matter not to be lightly disregarded. See, e.g., *Federal Stainless Sink Div. of Unarco Industries, Inc.*, 197 NLRB 489, 491 (1972); *Gateway Transportation Co., Inc.*, 193 NLRB 47, 48 (1971); *Georgia Rug Mill*, 131 NLRB 1304, 1305, fn. 2 (1961). Still further, *Malick's* testimony in large part went uncontroverted. In short, I credit *Malick's* testimony in all critical respects.

[11] The petition was never filed with the Board. According to *Quigley*, he spoke with a Board agent from the Board's Boston Regional Office and to Business Agent *Foley* as to whether he (Quigley) or the RWDSU should file the petition and the matter became too complicated, "[s]o it was dropped."

tioned Del Guidice regarding the basis of having the Teamsters contract apply to Rocky Hill given the fact that only six employees from New Haven transferred and Del Guidice explained that the contract covered McKesson's Connecticut division which included that location. According to Quigley and McCullough, Del Guidice told the employees at that meeting, *inter alia*, that the former Springfield employees would not have to pay Teamsters initiation fees but that the new employees and the previously unrepresented former East Hartford employees had to pay such fees, and all employees had to join the Teamsters within 30 days as a condition of continued employment. While Del Guidice conceded that he told employees that they had to join the Union and that Springfield employees were exempted from initiation fees, he denied that he set any time frame and averred that the exemption for initiation fees was extended also to former East Hartford employees.

The next meeting was for the warehouse employees and was held immediately after the meeting attended by the drivers. Malick, a warehouse employee, ascribed to Del Guidice substantially the same remarks in that later meeting as had Quigley and McCullough in the earlier session. Thus Malick testified that Del Guidice told the warehouse employees that if they did not join the Union they would be out of jobs and that new employees had to pay initiation fees. Malick, Quigley, and McCullough testified that Corcoran reminded employees to sign union cards which were distributed at these meetings. Malick also testified that this meeting with Teamsters officials was the first he heard of the Union since he began working for McKesson and he signed a Teamsters card on that occasion.[12] The Company's officials, including Corcoran, were in attendance at these meetings during the entire session. According to Corcoran, his participation was limited to introducing the business agents and inviting questions from employees to the Union's representative regarding wages, benefits, and the validity of the contract. Corcoran denied saying anything to employees about signing union cards. It is undisputed that Teamsters Steward Frank Alongi, Sr., passed around union cards for employees to sign at these meetings.[13]

Quigley testified that, immediately after the meeting with Teamsters officials ended, he returned to the shipping area to continue sorting invoices which he had begun doing before the meeting was called. According to Quigley, Corcoran approached him and asked whether he was through filing petitions with the Labor Board and added, "You know that's soliciting on company time. It's against company rules and you can be fired." Corcoran conceded that he broached the subject of solicitation but denied making any reference to filing petitions with the Board. According to Corcoran, on the occasion in question, Operations Manager Rick Robbins informed him that Quigley had conducted a meeting with some employees in a corner of the warehouse and he, Corcoran, thereupon went to the shipping area and approached Quigley and informed him that "[t]he rules are that there are not to be any unauthorized meetings when people are supposed to be working."[14]

B. *Discussion and Conclusions*

1. Recognition and the Teamsters contract executed in 1978

The critical facts giving rise to the bargaining relationship and the disputed contract between Respondents McKesson and Teamsters relative to the Rocky Hill facility are summarized and discussed as follows.

In 1978 Respondent McKesson decided to close its distribution center in Springfield, Massachusetts, as well as its distribution centers in New Haven and East Hartford, Connecticut, and to consolidate these facilities at a new location. The Company commenced negotiations for the new consolidated site with the town of Rocky Hill and advised the Teamsters and RWDSU of these negotiations. By letters dated June 1978 (G.C. Exhs. 4 and 5), the Teamsters (New Haven) and RWDSU (Springfield) were notified, *inter alia*, of the Company's willingness to bargain over the impact of its decision to consolidate on their respective memberships (East Hartford was unrepresented).

McKesson's manager of labor and employee relations, William Momaney, testified that he met with the Teamsters and RWDSU concerning the impact of the Company's decision to consolidate and only the Teamsters requested recognition for the employees at Rocky Hill. Respondent McKesson contemplated a nonsupervisory work force of approximately 48 employees at the new location (Jt. Exhs. 1 and 9). According to Momaney, on the basis of informal employee interviews, the Company anticipated that approximately 30 employees would transfer from New Haven to Rocky Hill thereby giving the Teamsters a clear majority at that new location. Momaney testified that, in these circumstances and as no other union demanded recognition for the employees at Rocky Hill,[15] he recognized the Teamsters as the bargaining agent for the employees at that location.

[12] While *Malick* testified that as an applicant in July he was told by company officials that the Rocky Hill facility was a union shop, he also credibly testified (as previously noted) that the Union was not identified.

[13] The union dues and checkoff provisions of the McKesson-Teamsters contract were not effectuated until sometime in October after these meetings took place. Previous thereto, McKesson had deducted (RWDSU) union dues from the former Springfield employees for which they were reimbursed in October.

[14] I credit *Quigley's* version over the account provided by *Corcoran*. In doing so it is noted, *inter alia*, that Quigley's testimony in other disputed areas was supported by corroborative testimony. For example, Del Gudice denied (as noted previously) giving employees any specific time frame by which to sign union cards. *Quigley* testified, however, with corroboration from other witnesses including Corcoran, that Del Guidice gave employees 30 days to sign union cards. On the other hand, *Corcoran's* testimony in a number of significant areas including the circumstances leading to his verbal encounter with *Quigley* was uncorroborated. Thus it is noted, *inter alia*, that Operations Manager *Robbins* did not testify. Moreover I found *Corcoran's* overall testimony uncertain and inconsistent, further reflecting adversely on his credibility. For example, *Corcoran* first stated categorically that *McKesson* had posted its no-solicitation rules (Resp. Exh. 1) in Springfield and New Haven and then retreated, admitting that he did not know whether the rules had ever been posted at those locations.

[15] Momaney testified that he met with John Foley, business agent of the RWDSU, in September 1978 and they discussed, *inter alia*, the approximate date for closing the Springfield facility. While Momaney testified that Foley never requested recognition, this by itself is not tantamount to a disclaimer of representative status, particularly as the record

Continued

In late November or early December 1978 McKesson and the Teamsters executed a 3-year renewal collective-bargaining agreement "cover[ing] all warehouse employees and drivers in the Company's Connecticut Distribution Center . . . ."[16] (G.C. Exh. 2.) Respondents contend that the aforenoted agreement contemplated and covered the Rocky Hill facility whenever it was to become operational. Respondent McKesson in its brief asserted that it acted lawfully and in good faith by recognizing and bargaining with the Teamsters *vis-a-vis* Rocky Hill. According to Respondent McKesson, "it had no inkling that the Teamsters lacked majority support at Rocky Hill until the very eve of that facility's opening."

This case, however, does not turn on "good faith." The inescapable fact is that the Teamsters at no material time represented a majority of the Rocky Hill employees.[17] In November 1978 when Respondent McKesson recognized the Teamsters for the Rocky Hill location, the Company not only did not have any employees at Rocky Hill, but as testified by Momaney, "There was no building (in Rocky Hill) at that time."[18] As noted by the Board in *General Cinema Corporation, and Its Wholly Owned Subsidiary, Gentilly Woods Cinema*, 214 NLRB 1074, 1075 (1974), where the respondent recognized a union for its projectionists when it had not hired any:

> This constitutes premature recognition in its barest form. It has long been settled that premature recognition of a nonrepresentative union, absent accretion, unlawfully assists the union, *regardless of the employer's good faith* or the absence of a question concerning representation. [Emphasis supplied.]

In the case at bar the parties were at liberty to execute a renewal contract *vis-a-vis* New Haven. The parties could not, however, extend coverage of the disputed renewal contract to a facility which had not yet commenced operations (Rocky Hill) at a time when no employees were yet hired for that facility. By doing so in effect, the parties converted the agreement insofar as it related to Rocky Hill into a prehire contract. See *Hudson Berlind Corporation*, 203 NLRB 421, 422 (1973), enfd. 494 F.2d 1200 (2d Cir. 1976). However, the General Counsel conceded that findings of unlawful assistance and support by Respondent McKesson and acceptance of same by Respondent Teamsters *vis-a-vis* recognition and execution of the renewal contract in 1978 insofar as it pertained to Rocky Hill are time barred by Section 10(b) of the Act.[19] On the other hand, the General Counsel contends and I find that subsequent acts and conduct, including recognition of the Teamsters as the bargaining agent for the employees at Rocky Hill around the third week in September 1979, coercive meetings with employees in October 1979 on behalf of the Teamsters, and application of the disputed Teamsters contract in or around October 1979, are cognizable in the circumstances of this case for the reasons discussed below. See, e.g., *N.L.R.B.* v. *R. L. Sweet Lumber Company*, 207 NLRB 529, 536 (1973), enfd. 515 F.2d 785 (10th Cir. 1975), cert. denied 423 U.S. 986.

2. The 10(b) defense and application of the contract to Rocky Hill employees

The parties stipulated at the hearing that at all material times the Teamsters contract had been applied to employees at Rocky Hill. It is not possible to discern what the parties contemplated by "material times" given the fact that Respondents McKesson and Teamsters in their respective briefs raised for the first time that all allegations relative to recognition and the contract at Rocky Hill are time barred by Section 10(b). The complaint alleged September 1979 as the material date whereby recognition was accorded and the contract containing, *inter alia*, a union-security clause was entered into, maintained, and enforced. (G.C. Exh. 1(m), pars. 13–15). Respondent Teamsters in its answer admitted these allegations in their entirety (G.C. Exh. 1(o)), whereas Respondent McKesson denied only the alleged September date (G.C. Exh. 1(p)). Neither party set forth an affirmative defense. The 10(b) proviso does not impose a jurisdictional limitation upon the Board but is a statute of limitations. *N.L.R.B.* v. *A. E. Nettleton Co., et al.*, 241 F.2d 130, 133 (2d Cir. 1957); *A. H. Belo Corporation (WFAA-TV)* v. *N.L.R.B.*, 411 F.2d 959, 966–967 (5th Cir. 1969). As such, it is an affirmative defense and, if not timely raised, is waived. *Vitronic Division of Penn Corporation*, 239 NLRB 45, fn. 1 (1978); *System Council T-6, I.B.E.W., et al. (New York Telephone and Telegraph Company)*, 236 NLRB 1209, 1217 (1978), enfd. 599 F.2d 5 (1st Cir. 1979); *Barton Brands, Ltd.*, 215 NLRB 416 (1974); *N.L.R.B.* v. *A. E. Nettleton Co., et al., supra* (absent extraordinary circumstances). As no reason has been advanced by Respondents for failing to raise this issue

does not establish that the Company appraised Foley of all the material facts. For example, Momaney conceded that he did not disclose to Foley that the Teamsters was demanding recognition for the employees at Rocky Hill. In this regard it is noted that more employees eventually transferred to Rocky Hill from Springfield than from New Haven (G.C. Exh. 7). Moreover, any demand by Foley in September 1978 would have been premature as there were no employees then employed at Rocky Hill.

[16] The General Counsel noted that the "execution of the contract" occurred outside the 10(b) period and accordingly did not allege it independently as violative of Sec. 8(a)(2).

[17] The record disclosed that the Rocky Hill location opened in August 1979. During that first month the work force was comprised of approximately 20 new hires, 6 transferees from East Hartford, and 8 transferees from Springfield. Thus none of the employees employed at Rocky Hill during the first month of operations were "Teamsters" or former New Haven employees. (G.C. Exh. 7.) Only six employees transferred from New Haven and that occurred on September 10. As of October 1, there were approximately 63 employees at Rocky Hill of which only 6 were former New Haven employees. The vast majority of the employees at Rocky Hill in October 1979 were new employees.

[18] It is also noted that Rocky Hill did not become operational until either the final stages of permanently shutting down the New Haven facility had begun or that facility had already actually closed. In either event, New Haven was no longer a viable facility for purposes of accretion. See *Bristol Consolidators, Inc.*, 239 NLRB 602, 605 (1978).

[19] The original charges against Respondent McKesson (G.C. Exh. 1(a)) and Respondent Teamsters (G.C. Exhs. 1(e) and (g)) were filed on February 21 and March 19, 1980, respectively. Sec. 10(b) provides in pertinent part that:

> [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . .

heretofore, I find the 10(b) defense is untimely.[20] Accordingly I do not find any legally sufficient impediment to consideration of these allegations on their merits.

As noted previously, the Rocky Hill facility opened in August with approximately 20 new employees. On August 27, 14 employees were added to the work force at Rocky Hill and all of them had transferred either from Springfield (RWDSU) or East Hartford (unrepresented). There were only six employees at New Haven (Teamsters) who elected to transfer and that did not occur until September 10. According to Respondent McKesson, as stated in its brief, it did not learn until "the very eve of that facility's opening" that a majority of the Rocky Hill employees would not support the Teamsters and then it made "no attempt to enforce the union security and check off provisions of the Teamster contract."

On the other hand, the Company continued to deduct union dues from the wages of the former Springfield employees on behalf of the RWDSU. Thus for the entire month of September the former Springfield employees faced the anomalous circumstance of working under two different union-security contracts (Teamsters and RWDSU) although only the RWDSU union-security provision was enforced as to those employees. To counter this confusion, Quigley and McCullough around the third week in September circulated a petition among the employees calling for an election to determine the bargaining agent for them at Rocky Hill. On some unspecified day in September Quigley and McCullough informed Distribution Center Manager Corcoran that employees had signed a petition calling for an election. Corcoran checked with his superior and later the same day conveyed to Quigley and McCullough that the Company would honor the Teamsters contract.[21]

Approximately 1 week later in early October, Respondent McKesson summoned its employees to the distribution center lunchroom for group meetings with representatives of the Teamsters. Corcoran, who had not previously met the Teamsters representatives, introduced them to the employees while explaining that said Teamsters representatives were there to answer "[employee] questions regarding wages and benefits and the validity of the contract." Employees Malick, Quigley, and McCullough credibly testified that Business Representative Del Guidice told the employees, *inter alia*, that they would have to sign union cards or they would be out of a job. Del Guidice confirmed as much by admitting that he told the employees that they had to join the union as a condition of employment. Teamsters membership cards were circulated and the credited testimony discloses that Corcoran reminded the employees that they had to sign these cards. In these circumstances noting particularly that the Teamsters had not at any time material herein represented an uncoerced majority at Rocky Hill, I find that, by making accessible the Rocky Hill facility to the Teamsters and then joining said Teamsters in its exhortation to employees to sign membership cards under the threat of discharge, Respondent McKesson thereby rendered aid and support to Respondent Teamsters in violation of Section 8(a)(1) and (2) as alleged. See *Hudson Berlind Corporation, supra; Bristol Consolidators, Inc., supra.*

It is undisputed that, commencing in October, Respondent McKesson deducted initiation fees and union dues from the wages of employees under the union-security provision in the Teamsters contract. Inasmuch as McKesson gave effect to the union-security clause contained in the Teamsters contract found herein to have been applied to employees at Rocky Hill in violation of Section 8(a)(1) and (2), I further find that Respondent McKesson also discriminated with respect to hire and tenure of employment in violation of Section 8(a)(1) and (3) of the Act. See *Schreiber Trucking Company*, 148 NLRB 697, 703 (1964); *Bristol Consolidators, Inc., supra; Hudson Berlind Corporation, supra.*

With respect to Respondent Teamsters, I find that, by accepting recognition at a time when it did not represent an uncoerced majority of the employees at the Rocky Hill facility and then participating in the administration or application of a contract containing a union-security clause in circumstances violative of Section 8(a)(1), (2), and (3) of the Act, it thereby violated Section 8(b)(1)(A) and (2) of the Act. *Desco Vitro-Glaze of Schenectady, Inc.*, 230 NLRB 379 (1977); *Bristol Consolidators, Inc., supra* at 605.

3. The 8(a)(1) allegations

The 8(a)(1) allegations are predicated on a verbal encounter between Corcoran and Quigley on the day Teamsters representatives first met with employees at Rocky Hill and shortly after the meeting attended by Quigley. According to Corcoran, Operations Manager Rollins told him that Quigley was conducting a meeting with some employees in a corner of the warehouse and he, Corcoran, then informed "[Quigley] that the Rules are that there are not to be any unauthorized meetings when people are supposed to be working."

Quigley's credited version is that Corcoran approached him on the occasion in question and asked if he "was through filing petitions with the Labor Board." Corcoran then added, "You know that's soliciting on Company time. It's against company rules. And you could be fired." I find that the no-solicitation rule as an-

[20] In any event the 10(b) period does not commence running until the affected employees are put on notice of the facts constituting the unfair labor practice. See *Hot Bagels and Donuts of Staten Island, Inc.*, 227 NLRB 1597 (1977); *Wisconsin River Valley District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Skippy Enterprises)*, 211 NLRB 222, 227 (1974). In the instant case, the new employees were not told of the Teamsters contract until October 1979 although some of them were told before the Rocky Hill facility became operational that it would be union shop. Insofar as former Springfield employees were told of the Teamsters contract in July 1979, those employees were not then employed by McKesson at Rocky Hill. See *Diamond International Corporation, Calmar Division*, 229 NLRB 1334, 1336 (1977). It was not until around the third week in September that Corcoran told Quigley and McCullough that the Company would honor the Teamsters contract for the Rocky Hill facility (as will be further noted *infra*).

[21] In finding that Respondent McKesson unlawfully assisted and supported the Teamsters I do so principally on the basis that the Teamsters did not at any time material herein represent an uncoerced majority. It is also noted as contended by the General Counsel that under *Midwest Piping & Supply Co.*, 63 NLRB 1060 (1945), and its progeny Respondent McKesson was obligated to remain neutral where, as here, there are two unions with potential representative claims. See *Hudson Berlind Corporation, supra* at 423.

nounced by Corcoran to Quigley was overly broad in violation of Section 8(a)(1)[22] and that Respondent McKesson thereby unlawfully threatened to discharge said Quigley as alleged.

On the other hand, I find the remarks ascribed to Corcoran and the circumstances too ambiguous and unclear to conclude that they otherwise violated Section 8(a)(1) of the Act. For example, without more, I find it unlikely that Corcoran was actually attempting to elicit a response from Quigley regarding the filing of a Board petition. Nor do I find that Corcoran's remarks conveyed the impression of surveillance as alleged. In this connection it is noted that it was Quigley, a week or two earlier, who volunteered that he was involved in a petition calling for an election. Moreover the credible evidence did not establish whether Quigley was involved in union or related activities on that occasion. Rather, I find that Corcoran's statement was somewhat rhetorical but motivated to inhibit Quigley from engaging in union activities and utilization of the Board processes. In these circumstances I am unpersuaded that Respondent coercively interrogated employees or conveyed the impression of surveillance as alleged. Accordingly, I shall dismiss these allegations.

CONCLUSIONS OF LAW

1. Respondent McKesson Drug Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Teamsters Local 443, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. Local 566, Retail, Wholesale and Department Store Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

4. Respondent McKesson has rendered unlawful assistance and support to a labor organization by recognizing Respondent Teamsters and giving effect to a collective-bargaining agreement with said Respondent Teamsters for employees employed by Respondent McKesson at its Rocky Hill, Connecticut, facility, when said Respondent Teamsters did not represent an uncoerced majority of employees, thereby violating Section 8(a)(1) and (2) of the Act.

5. Respondent McKesson has discriminated, and is discriminating, in regard to hire or tenure or terms of conditions of employment of its employees, thereby encouraging membership in a labor organization, by maintaining a union-security clause in a collective-bargaining agreement with a minority union, thereby violating Section 8(a)(1) and (3) of the Act.

6. Respondent McKesson threatened employees with discharge for engaging in union activities and/or utilizing the Board's processes and promulgated an overly broad and unlawful no-solicitation rule, thereby restraining and coercing employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

7. Respondent Teamsters, by accepting recognition and giving effect to a collective-bargaining agreement containing a union-security clause for employees employed at the Rocky Hill facility notwithstanding that it did not represent an uncoerced majority of employees at any time material, thereby violated Section 8(b)(1)(A) and (2) of the Act.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. Other than as set forth above, Respondents have not violated the Act as alleged.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondents committed unfair labor practices by giving effect to a collective-bargaining agreement containing a union-security provision under circumstances violative of Section 8(a) (1), (2), and (3) on the part of Respondent McKesson and Section 8(b)(1)(A) and (2) on the part of Respondent Teamsters, Respondents will be required jointly and severally to reimburse all present and former employees, except those excluded below, for all initiation fees, dues, or other moneys paid or checked off pursuant to the unlawful union-security provision with interest thereon to be computed as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). Reimbursement, however, will not extend to any such employees who may have voluntarily joined and been members of Respondent Teamsters prior to October 1, 1979. See *Bristol Consolidators, Inc., supra* at 605.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[23]

A. Respondent McKesson Drug Company, Rocky Hill, Connecticut, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Recognizing or dealing with Respondent Teamsters as the bargaining representative of its employees employed at its Rocky Hill, Connecticut, facility unless and until Respondent Teamsters has been certified by the Board as the exclusive bargaining representative of such employees.

(b) Assisting Respondent Teamsters in any other manner to become the collective-bargaining representative of its employees.

(c) Giving effect to, performing, or in any way enforcing the collective-bargaining agreement with Respondent Teamsters entered into around November 1978 or to any modification, extension, renewal, or supplement thereto; provided, however, that nothing herein shall require Re-

[22] See *Birmingham Ornamental Iron Company*, 240 NLRB 898 (1979).

[23] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

spondent McKesson to vary or abandon any wage, hour, seniority, or other substantive feature of its relations with its employees which have been established in the performance of any such agreement or to prejudice the assertion by such employees of any rights they may have thereunder.

(d) Encouraging membership in, or activities on behalf of, Respondent Teamsters by discriminating against its employees with respect to their hire, tenure, and terms and conditions of employment.

(e) Threatening employees with discharge for engaging in union activities and/or utilizing the Board's processes and promulgating an overly broad and unlawful no-solicitation rule.

(f) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from Respondent Teamsters as the representative of its employees employed at its Rocky Hill, Connecticut, facility for the purposes of collective bargaining unless and until said labor organization shall have been duly certified by the Board as the exclusive representative of such employees.

(b) Jointly and severally with Respondent Teamsters reimburse each of its present and former employees for any and all initiation fees, dues, and other moneys, if any, paid by or withheld from them pursuant to the terms of the aforesaid collective-bargaining agreement, but such reimbursement shall not extend to any such employees who may have voluntarily joined and been members of Respondent Teamsters prior to October 1, 1979.

(c) Post at its Rocky Hill, Connecticut, facility copies of the attached notice marked "Appendix A."[24] Copies of said notice, on forms provided by the Officer-in-Charge for Subregion 39, shall, after being duly signed by Respondent McKesson's representative, be posted by Respondent McKesson immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify said Officer-in-Charge, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

B. Respondent Teamsters Local 443, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Acting as the exclusive bargaining representative of Respondent McKesson's Rocky Hill, Connecticut, employees for the purpose of collective bargaining unless and until it shall have been certified by the Board as the exclusive representative of said employees.

(b) Giving any force or effect to the collective-bargaining agreement executed with Respondent McKesson around November 1978 or to any modification, extension, renewal, or supplement thereto.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Jointly and severally with Respondent McKesson reimburse each of Respondent McKesson's present and former employees at the Rocky Hill, Connecticut, facility for any and all initiation fees, dues, and other moneys, if any, paid by or withheld from them pursuant to the terms of the aforesaid collective-bargaining agreement, but such reimbursement shall not extend to any such employees who may have voluntarily joined and been members of Respondent Teamsters prior to October 1, 1979.

(b) Post at its offices or meeting halls copies of the attached notice marked "Appendix B."[25] Copies of said notice, provided by the Officer-in-Charge for Sub-Region 39, shall, after being duly signed by Respondent Teamsters representative, be posted by Respondent Teamsters immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Officer-in-Charge, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that those portions of the consolidated complaint found to be without merit are hereby dismissed.

[24] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[25] See fn. 24, *supra*.